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May 6, 2002

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Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket No. 02-33
CC Dockets Nos. 95-20, 98-10

Dear Ms. Dortch:

Transmitted herewith, on behalf of the National Rural Telecom Association, is an amended copy of NRTA's comments in the above-referenced proceeding, originally submitted on Friday, May 3, 2002. The table of contents of the original submission lost its formatting in the transmission. Please substitute this corrected version for the comments filed on May 3.

If you have any questions, please communicate with the undersigned.

Very truly yours,

Margot Smiley Humphrey

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Dockets Nos. 95-20, 98-10

COMMENTS OF THE NATIONAL RURAL TELECOM ASSOCIATION

National Rural Telecom Association

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May 3, 2002

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COMMENTS OF THE NATIONAL RURAL TELECOM ASSOCIATION

The National Rural Telecom Association (NRTA) submits these comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[1] NRTA is an association of incumbent local exchange carriers (ILECs) that obtain financing under Rural Utilities Service (RUS) and Rural Telephone Bank (RTB) programs. All NRTA members are rural telephone companies, as defined in 47 U.S.C. §153(37).

I. INTRODUCTION AND SUMMARY

The outcome of this proceeding may well spell the difference between whether NRTA members are able to maintain and expand broadband Internet access in their typically rural, low-density, high-cost service areas. The Commission is right to select encouraging availability of

broadband to all Americans as its primary goal. But it should recognize that §254, as well as §706, must guide its policies and actions in pursuing the worthy national objectives of ubiquitous deployment and nationwide access to reasonably comparable advanced telecommunications and information services in rural and urban areas. Once market forces have shown where broadband is not feasible or will not be reasonably timely, the Commission will at some point need to provide some universal service support to finish the job.

Fairness among different competing platforms and technologies, as well as willingness to look anew at legacy regulations are also sound objectives. Minimal regulation is an ultimate goal of the 1996 Act, but the Commission must not discard beneficial regulatory powers that it may still need to achieve the national policies Congress has directed it to implement. Moreover, regulatory certainty is a necessity, but should lead the Commission to avoid excessive reliance on the agency-created Title I regulatory powers instead of the known and flexible Title II authority. Using Title II, it can preserve "good" regulatory results like the value of joint tariffing and pooling for rural carriers' ability to offer broadband capability and advanced services and maintain important common carrier principles in the areas of copyright and obscenity that recognize that the function of carriers is different from that of information providers.

Treating the same functions as equitably as possible when provided on different platforms and through different means of coordinating information and communications capabilities will produce the most fair and pro-competitive results. Comprehensive broadband policy cannot be rationally accomplished by dealing with separate platforms piecemeal or maintaining traditional mindsets about asymmetrical incumbent telephone responsibilities or

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[1] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, Notice of Proposed Rulemaking (NPRM) (rel. Feb. 15, 2002).

regulatory breaks to nurture infant competitors because the market has changed with the explosive growth of the Internet and broadband access via cable modem and other platforms.

Congress gave the Commission tools and responsibilities in Title II, including universal service directives and funding authority, the power to provide for joint tariffing and pooling and extensive authority to streamline and forbear from regulation when appropriate to achieving its sometimes competing duties to promote competition, preserve and advance universal service and reduce regulation. Using the tool of reclassifying wireline broadband Internet access as an "information service" with no regulated communications aspect as the Commission has for cable modem access inflexibly ties the Commission's hands. By "defining" the access functions as containing no "telecommunications service" component, the Commission eliminates the eligibility of the communications function for universal service support, makes costs for the communications component of broadband Internet access ineligible for tariffing and pooling and abandons decades-worth of common carrier means for effectively carrying out the Commission's statutory duties. It can avoid this loss by simply defining broadband access as a hybrid service combining a "telecommunications service" component with an "information service" component. If it nevertheless goes ahead with its proposal to "define" the "telecommunications service" component out of existence, it will have to find ways to recreate means to allow pooling and tariffing and to find new universal service authority under Title I and §706. Allowing carriers to provide bundled but "unintegrated" DSL based Internet access could also be a means to claim regulatory benefits that the rigid definitional approach jeopardizes. The Commission cannot, in good conscience, take the route of defining wireline broadband Internet access as purely an "information service" with an unregulated communications input unless it finds

watertight lawful means to solve the severely adverse side- effects threatened for rural customers' communications and information access.

While preserving the customer benefits of Title II, the Commission should not extend the burdensome Computer III regulations to small and rural ILECs. Small and rural carriers have never been subject to these regulations designed for the largest, urban-based carriers. There is no need to impose them now.

Finally, whatever interpretation it adopts for the "information services" definition whether facilities-based Internet access providers are providing a "telecommunications service" or merely "telecommunications," the Commission must ensure that all facilities-based providers contribute equitably to the funding of universal service. Providers of "telecommunications services" are mandatory contributors. But the Commission can and must exercise its discretion under §254(d) to require all providers of "telecommunications" to contribute on the same basis, regardless of what contribution assessment method the Commission ultimately adopts. Traffic is shifting to the Internet and there is growing substitution of Internet applications for interstate telephone calls. The decline in the interstate revenues of interexchange carriers that now generate the majority of universal service funding adds to the current instability of the fund. And competitive neutrality compels even-handed contribution requirements for all competing platforms and services. Only a pervasive contribution requirement that prevents support evasion or arbitrage can provide the stable, sustainable and sufficient support that Congress intends.

II. THE COMMISSION HAS IDENTIFIED THE CORRECT STATUTORY OBJECTIVES TO PURSUE IN MODERNIZING ITS POLICIES FOR BROADBAND INTERNET ACCESS OVER WIRELINE FACILITIES TO REFLECT NEW NATIONAL LAWS

The NPRM (¶¶1-2) launches the Commission's "thorough examination of the appropriate legal and policy framework … for broadband access to the Internet provided over domestic wireline facilities by identifying the principles and goals, "grounded in … the Communications Act" and recognizing that the underlying "statutory objectives to promote competition and universal service have not changed." NRTA endorses both the Commission's goals and its commitment to the statutory foundation upon which all of its policies must rest, but takes the opportunity to examine the goals and proposals from the perspective of the small and rural carriers that are members of NRTA.

The Commission begins ((¶3), as it must, by stating its "primary policy goal to encourage the ubiquitous availability of broadband to all Americans." While the Commission links its policy goal to §706 of the Communications Act,[2] it is also crucial to the long term development of truly ubiquitous broadband deployment and availability that the Commission recognize the national policy enacted in §254(b)(2)-(3) of the Act. These provisions call for "access to advanced services … in all regions of the Nation," and "reasonably comparable" rural and urban "access to telecommunications and information services, including interexchange services and advanced telecommunications and information services" at "reasonably comparable … rates." The marketplace is still too young, in NRTA's view, to mandate across-the-board support for broadband deployment. Market forces should first be given the chance to demonstrate where deployment will be feasible and to reduce the costs of deployment by developing mass market penetration. But there will be a time when universal service support will be needed to finish the

job. Accordingly, it is essential that the Commission preserve its ability to provide that support as it classifies broadband Internet access and designs an appropriate regulatory framework for the competitive economy.

The Commission's second and fourth policy objectives are important to achieving a fair, competitively and technologically neutral policy and regulatory framework. The Commission seeks (¶¶ 4, 6) to "conceptualize broadband broadly to include any and all platforms capable of fusing communications power, computing power, high-bandwidth intensive content, and access to the Internet" and, most importantly, to employ an "analytical framework that is consistent, to the extent possible, across multiple platforms."

NRTA agrees with these goals and encourages the Commission to recognize how much the broadband marketplace has changed. Especially given the predominance of cable modem-based service for Internet access, the marketplace has reached the point where the Commission must be more even-handed in meting out requirements. Otherwise, it cannot avoid the growing clashes between existing regulatory inequities and both the pro-competition and the nationwide infrastructure and service availability thrusts of the Telecommunications Act of 1996. Therefore, NRTA strongly endorses the Commission's commitment (¶7) to "avoid simply extending existing rules … crafted to govern legacy services provided over legacy networks."

While equalizing the competitive positions of providers and platforms, however, the Commission should conscientiously preserve regulatory procedures that benefit customers and carriers in rural areas. Prominent among these essential arrangements are the joint tariffing and pooling of services, such as DSL, that are currently provided by small and rural carriers under the aegis of the National Exchange Carrier Association (NECA). Moreover, as part of the

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[2] § 706(a) and (b) of the Telecommunications Act of 1996 (1996 Act), Pub. L. 104-104, Title VII, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157nt.

Commission's purpose "not to embed particular technologies," it should keep in mind the need for healthy incentives for small and rural carriers – which often provide rural consumers their first chance to obtain any broadband platform for Internet access – to continue to upgrade their networks and bring fiber closer to their customers.

The Commission's third goal (¶5) is to achieve a "minimal regulatory environment that promotes investment and innovation in a competitive market" and to "limit[ ] regulatory uncertainty and unnecessary or unduly burdensome regulatory costs." NRTA agrees with the goal of minimal regulation, with the caveat that total freedom from regulation for Internet access is not compatible with universal broadband availability or equitable competition. The fact is that not all parts of the nation are equally able to attract the "substantial investment" the NRPM recognizes (*ibid*.) is necessary for ubiquitous broadband, high-speed Internet access, let alone to achieve that access, as §706 contemplates, "on a reasonable and timely basis." The first part of this goal would better fit the statute if rephrased as "to achieve a minimal regulatory environment *when* minimal regulation will promote investment and innovation in a competitive market."

III. THE COMMISSION'S FUNCTIONAL APPROACH IS SOUND, AND THE SAME FUNCTIONS SHOULD HAVE NONDISCRIMINATORY REGULATORY CONSEQUENCES FOR ALL PLATFORMS AND PROVIDERS

The Commission intends (¶7) to base its regulatory classifications and framework on the "nature of service provided to consumers, rather than technical attributes of the underlying architecture." It will examine the functional output, rather than the platform. Given its goal of fostering healthy competition between different broadband platforms and providers, this is a sound approach. The Commission cautions (*ibid*.) that using a **"**consistent analytical framework may not lead to identical regulatory models across platforms" and that "legal, market, or technological distinctions may require different regulatory requirements between platforms, or

between certain types of providers of one particular platform." NRTA understands that there may be a need, under the law, to treat some of the operations of cable systems, for example, pursuant to Title VI, and that there are statutory and regulatory consequences related to the provision of "common carrier" services subject to Title II. Thus, providers may not have company-wide identical regulation. However, the Commission should not differentiate among the obligations of various platform providers in an effort to maintain asymmetrical past roles and responsibilities for ILECs and their competitors or to create new ones in connection with their Internet access business. With the exception of genuine statutory requirements related to other activities of a broadband Internet access provider or requirements that must be tailored to accommodate technology differences to achieve evenhanded results, competing providers must be treated the same to avoid competitive or technological handicapping.

For this reason, it is unfortunate that the Commission has chosen to proceed piecemeal in the four separate broadband proceedings it identifies in paragraph 8 and to separate the broadband universal service contribution issues from its proceeding regarding connection-based contributions proposals.[3] There is a real danger that, so long as the Commission considers telecommunications "wireline" policy separately, it will never be able to free itself of the traditional common carrier mind-set and habits of pervasive regulation that the 1996 Act intends to pare away. Conversely, so long as the Commission looks at non-wireline technologies separately, even when they are performing the same functions, there is an even graver danger that it will not be able to free itself of the habit of relieving them of the responsibilities appropriate to their increasing importance in the marketplace and in national life. Functions and services are converging, and the Commission cannot design policy that recognizes this market

[3] *Universal Service Contribution Methodology, Further Notice of Proposed Rulemaking and Report and Order*, FCC 02-43 (rel. February 26, 2002).

fact in scattered proceedings on disparate schedules for platforms with identical Internet access functions. The Commission should consider harmonizing its cable modem determinations with its wireless policies with both issues before it simultaneously, for example, rather than deciding cable modem Internet access issues first[4] – in a vacuum – and potentially limiting its choices here if it tries to pursue competitive neutrality in this after-the-fact wireline Internet access proceeding. Without looking at the shared functions of different platforms together, the Commission cannot seriously expect to develop the intended "foundation for a comprehensive and consistent national broadband policy."

IV. THE COMMISSION MUST INTERPRET THE STATUTE TO PRESERVE ITS CONGRESSIONALLY-INTENDED AUTHORITY TO (1) ENCOURAGE NATIONWIDE BROADBAND DEPLOYMENT AND UNIVERSAL SERVICE, (2) MAXIMIZE THE DEVELOPMENT OF A ROBUST COMPETITIVE MARKETPLACE AND (3) MINIMIZE REGULATORY BURDENS CONSISTENT WITH PROMOTING CONSUMER INTERESTS

A. The Commission Should Exercise its Authority to Classify Broadband Internet Access In a Manner that (1) Does Not Abandon Flexibility or Authority Unnecessarily because of Past Interpretations, (2) Retains Sufficient Authority to Achieve the Purposes of §254 and §706 and (2) Maintains the Opportunity to Continue NECA Tariffing and Pooling of Broadband Services

1. "The Commission Can Only Retain the Range of Authority Congress Intended by Classifying Wireline Broadband Internet Access as a Hybrid with "Information Service" and "Telecommunications Service" Components

The NPRM asks (¶27) whether broadband Internet access should be classified as a hybrid service. It should, and this change will require the Commission to break new ground in recognition that the environment has changed. As the NPRM explains (¶13), the Commission has previously defined as "information services" wireline broadband Internet access services that "fuse communications power with powerful computer capabilities and content" and "blend

[4] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities,*FCC 02-77 (rel. March 15, 2002) (Cable Modem Declaratory Ruling).

communications with computer processing." Indeed, the Commission has already determined in its Report to Congress and the Cable Modem Declaratory Ruling that access to the Internet is an "information service" because of the integration of computer operations and the wealth of information and functions provided to the customer. The functions are the same here, but the conclusions the Commission has drawn from the mere coexistence of communications and information have been unnecessarily sweeping and would be imprudent to extend here.

The Commission, before the development of today's Internet phenomenon, began (¶13) by classifying "information services such as voice mail, telemessaging, or credit card validation … [as] an incremental extension of the existing narrowband telecommunications network … [and as] using the 'existing telephone network to deliver services that provide more than a basic transmission offering,' or as 'enhancements that build upon basic services.'" Thus, the Commission understands that it is not compelled to give up all Title II authority over the telecommunications component of offerings that include information. Now the Commission realizes that the power of broadband and the Internet have changed the scene considerably. Past characterizations may be just the kind of "existing rules … crafted to govern legacy services provided over legacy networks" that the Commission has pledged (¶4) to avoid simply extending into its modernized regulatory regime. However, it may be planning to go too far, dropping all Title II authority out of the picture as soon as there is an information component, as it has done for cable modem Internet access. This destruction of its own flexibility and authority is not a prudent way for the Commission to apply its functional equality approach or to apply the statutory definitions in a consistent and equitable manner for all platforms.

The current statutory definition provides that "'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or

making available information via telecommunications …." It does not incorporate the enhanced services understanding based on a much simpler information and telecommunications environment. Instead, the definition focuses on the information manipulation capability as the "information service" and recognizes that the capability is made available through a separate agency, that is, "via telecommunications." The 1996 Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[5] The Commission distinguishes between the public offering and the communications capability itself. "Telecommunications," which is the agent by which information services are provided and is subsumed by the definition of "telecommunications service," is defined in turn as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[6]

The function that "telecommunications" plays in providing Internet access service is identical for cable modem, wireline, satellite, wireless or any other platform. Under prior Commission policies, when an ISP obtains transmission under tariff from a carrier to bundle with its Internet access package, it is using a "telecommunications service" provided by another, but is not itself providing a "telecommunications service." Analogously, under the function standard, if a wireline provider or cable modem provider offers an integrated Internet access package to customers on its own facilities, it is reasonable to say it is providing itself an independent "telecommunications service" because it is performing the same function and the ISP's customer is getting the same two functions.

[5] 47 USC §153(46).
[6] 47 USC §153(43).

The Commission should treat these two functional equivalents in the same way, but it currently does not. The Commission instead now considers that the facilities-based broadband Internet access provider is simply using or providing "telecommunications." Unfortunately, the Commission's current approach, applied to wireline broadband Internet access, will jettison more of the Commission's Title II common carrier authority than is necessary or wise. For example, it would prevent small and rural carriers from providing their DSL services as participants in the NECA pools and tariffs and could expose them to copyright, obscenity or other responsibilities for information that is not under their control in providing the communications function of carrying the flow of information to and from the Internet.

The Commission should recognize that its tentative conclusion that wireline broadband Internet access is an "information service" without a "telecommunications service" component is not necessary under the law and can have these and other unpredictable, unintended consequences, particularly in rural America. These regulatory side effects are likely to discourage ILECs from deploying DSL and offering broadband Internet access.

Therefore, in light of the major changes in the way technology operates and computer operations are coordinated with transmission and other telecommunications functions, the Commission should rethink the line it has tried to draw between "information services" and "telecommunications services." The 1996 Act definition of "information service," is consistent with a mutually-exclusive classification scheme of "information services" and "telecommunications services" and recognizes that there is always a "telecommunications" component of information services. However, the statutory definition does not compel a decision that every time an information capability is involved, the underlying broadband telecommunications component is sucked out of Title II and cast into the murky waters of Title I.

Title I does not provide regulatory certainty because the Commission basically has to create its Title I authority as it goes along and hope for judicial validation. The Commission has not revamped its definitions as technology and market facts have changed. Regulatory certainty is promoted far better by revisiting the issue for all platforms, carving out what is actually the "offering of a capability" for manipulating information as the information service component and applying Title II regulation to the telecommunications component, whether separately provided to the ISP and bundled with its information service or provided for itself by the ISP and bundled with its information service. To the extent that the Commission believes that Title II regulation is not necessary, the Commission can streamline or forbear from Title II regulation to achieve the same result as it has previously tried to achieve with the classification method. However, this approach would leave the Commission with the freedom to provide for universal service support when and where necessary, to preserve pooling and tariffing where it furthers important statutory goals, to treat all providers equitably for purposes of universal service contributions and to decrease government involvement as appropriate over time.

In short deregulating by "definition" ties the Commissions hands. But, in any event, even if the Commission goes forward to reclassify wireline broadband Internet access as an information service, it must find ways to preserve the authority necessary to pursue and achieve the objectives Congress enacted to govern its actions.

2. Even if the Commission Classifies Wireline Broadband Internet Access as an Information Service, it Must Retain the Authority to Use the Tools Congress Gave It to Achieve National Broadband Deployment and Ubiquitous Access to Information

As discussed above, §§254(b) and 706(a) include specific national commitments to nationwide advanced telecommunications capability and reasonably comparable rural and urban

services that include advanced telecommunications and information services.[7] Moreover, section 254(e) requires federal universal service support that is "sufficient to achieve the purposes of this section [§254]" and §706 directs the Commission, as necessary, to use,

> in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or *other regulating methods that remove barriers to infrastructure investment (emphasis added).*

Congress plainly intended the Commission to have the tools necessary to accomplish the goals it set in these two sections.

If the Commission recognizes that wireline broadband Internet access involves a telecommunications service component, it will retain all its current flexibility and authority both to pursue the objectives set by Congress and to relax regulation when its objectives will be served. In contrast, the Commission's tentative decision to classify the telecommunications component in all wireline access to the Internet as "telecommunications" rather than as a "telecommunications service" when provided as part of an integrated "information service," could jeopardize these objectives. As noted, in reclassifying the offering, the Commission plans to submerge the communications component within the "information service" definition, regardless of whether the Internet access is facilities-based or "self-provided." In each case, the Commission would regard the provider as "using 'telecommunications.'" The Commission's

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[7] Section 254(b)(2) provides that "Access to advanced services …should be provided in all regions of the Nation."

Section 254(c)(3) expands on the requirement for rural areas:

> Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

Section 706(a) requires the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans …."

current practice classifies the telecommunications component in wireline-provided broadband Internet access as a "telecommunications service." The new classification as an "information service" that uses "telecommunications," however, would deprive the telecommunications component of eligibility for support because section 254(c) limits the definition of services eligible for support to "telecommunications services."

Even if it wisely chooses to wait until the market has further matured, the Commission must not give up its authority to provide support to finish the job of ubiquitous broadband deployment and ensuring reasonably comparable services and rates throughout rural areas. Once the market matures and demonstrates where marketplace forces and "encouragement" alone will not achieve the national policy enacted in the statute, the Commission will need these tools, and Congress intends it to use them. Accordingly, NRTA believes that the Commission should interpret §254 to authorize support for "access to … advanced telecommunications and information services" where necessary, even if it reclassifies the overall service offering. Alternatively (or additionally), the Commission should interpret §706's directive to use "other regulating methods that remove barriers to infrastructure investment" as a Congressional grant of authority to use its Title I authority to provide support for broadband Internet access when the time comes. Unless and until these problems are reliably and sustainably solved, the Commission could not, in good conscience, reclassify wireline broadband Internet access as an "information service." It is far better to specify that it is a hybrid service with a "telecommunications service" component. Moreover, to prevent an unfair competitive advantage and regulatory preference for the technology of the predominant broadband Internet access provider, the Commission should reconsider and modify its cable modem Internet access

classification and shape its regulatory treatment of broadband platforms to coincide with its wireline approach and schedule. In any event, Congress must not give up any of the authority Congress conferred on it to fulfill the universal service and ubiquitous broadband policies unless it is sure it has watertight authority to achieve the goals effectively through some other means.

3. If the Commission Re-Classifies Wireline Broadband Internet Access as an Information Service, It Must Preserve NECA Pooling and Tariffing of Broadband Internet Access Services

Many small and rural ILECs and rural ISPs that are now providing broadband Internet access are able to do so solely because the carriers are able to participate in NECA's special access tariffed broadband offerings, including DSL. Pooling involves risk sharing and the matching of revenues to costs. It allows participants to reduce the volatility of their individual company revenues by spreading those risks across many carriers. It is important to emphasize that for many small ILECs, deployment of advanced services would not be viable without pooling. As explained in the Fred Williamson and Associates, Inc. comments (p. 2) on the Incumbent LEC Broadband Notice,[8] the advanced services provided by numerous ILECs via DSL technology,

> are primarily interstate services whose rates are governed by [NECA]. Revenues for small rural [I]LECs' interstate broadband services are remitted to the NECA pool, and costs for the broadband services are assigned to and recovered from the NECA pool. Deployment of broadband services in many small rural areas at reasonable rates would not be possible without those [I]LECs having the ability to recover the associated costs from the NECA pool.

Pooling and joint tariffing enable NECA to set reasonable rates. If the Commission classifies wireline broadband Internet access as an "information service" with no separate "telecommunications service" component, the costs of the telecommunications component will

[8] *Review of Regulatory Requirements for Incumbent LEC Broadband Services; SBC Petition for Expedited Ruling That it is Non-Dominant in its Provision of Advanced Services and for Forbearance From Dominant Carrier*

no longer be subject to Title II common carrier regulation. Only regulated service costs are permitted to be included in tariffs filed pursuant to Part 69 of the Commission's rules.

Rural carriers that have deployed advanced services have done so according to the rules in force at the time, and altering those rules can destroy the business case for their deployment decisions. A sudden elimination of DSL-based service from the NECA pools could require significant rate increases, which might force some rural customers to discontinue their DSL-based services. It could also leave these carriers with significant stranded investment and financial losses. Further, pooling carriers would likely be discouraged from expanding DSL-based services, defeating the the Commission's goal (¶3) of encouraging the availability of advanced services to all Americans.

Accordingly, the Commission must make some accommodation to sustain these small and rural carrier offerings. Failing an adequate adjustment, this proceeding to encourage broadband deployment will have exactly the opposite effect, instead undermining Internet access that is being provided today. NRTA does not think that Title I regulation offers a remedy for this concern, although the Commission should explore all possible approaches to solving this problem. The hybrid definition recognizing that Internet access service has a "telecommunications service" component as well as an "information service" component would maintain carriers' current pooling and tariffing choices. But if the Commission adopts its proposed version of "information services," NRTA recommends that the Commission specify that members of the NECA traffic sensitive pool may nevertheless choose to offer Internet access on a bundled, but "unintegrated" basis, remaining within the definition of a "telecommunications service." In that case, the Commission should also specify that the "telecommunications

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Regulation of These Services, CC Docket No. 01-337, Notice of Proposed Rulemaking, FCC 01-360, 16 FCC Rcd 22745 (rel. Dec. 20, 2001) (Incumbent LEC Broadband Notice).

service" component would be subject to streamlined Title II regulation and could be included in the NECA tariffs and pool.

Plainly, the hybrid definition as an "information service" combined with a "telecommunications service" is simpler, more predictable in outcome and does not raise the specter of unforeseen consequences that across-the-board re-classification and possible Title I regulation necessarily involve. Thus, the hybrid service approach is preferable, and NRTA urges the Commission to adopt that approach.

C. The Commission Should Not Extend Computer III or Related Regulatory Schemes to Small and Rural Carriers

NRTA will confine its comments on proper regulatory reforms to the regime that should apply to small and rural wireline carriers. Computer III does not apply to these non-BOC and non-GTOC carriers because they lack the national dominance to make these burdensome requirements necessary, even in the wireline-centered, pre-competitive era.[9] That remains the case today.

Moreover, extra layers of new regulation can impede infrastructure deployment, universal service availability and efficiency. When Congress adopted the national competition policy and established requirements to "jump start" local competition in §251(c), it created a rural exemption and allowed small and midsize companies to request suspensions and modifications. There is no need to impose any additional requirements on broadband Internet access provided by small and rural wireline carriers. Indeed, the Commission has recognized that the marketplace is likely to leave low-density rural areas behind in broadband deployment.[10]

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[9] *See* NPRM ¶¶ 41-42.

[10] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, FCC 02-33, CC Docket No. 98-146, 2002 FCC LEXIS 655, ¶35 (February 6, 2002).

Accordingly, the Commission should concentrate on removing unnecessary regulatory burdens, preserving helpful regulatory options, removing barriers to investment and using regulatory incentives (and, at the appropriate time, universal service support) to provide effective "encouragement" for rural broadband deployment.

V. IN ORDER TO ENSURE THE STABILITY AND SUFFICIENCY OF UNIVERSAL SERVICE SUPPORT, THE COMMISSION SHOULD REQUIRE ALL FACILITIES-BASED BROADBAND INTERNET ACCESS PROVIDERS TO CONTRIBUTE EQUITABLY

The Commission seeks comment (¶66) on whether facilities-based broadband Internet access providers should contribute to universal service funding, particularly as traditional telecommunications services migrate to broadband platforms. Several factors support requiring every facilities-based broadband Internet access provider – and every underlying telecommunications provider for non-facilities-based broadband Internet access – regardless of platform, to contribute equitably to universal service funding. That requirement is necessary regardless of what contribution assessment method the Commission employs. Requiring contributions from all broadband Internet access providers is essential to maintain a stable and sufficient fund, now and in the future.

Under the hybrid service approach NRTA supports, all providers of the facilities-based telecommunications component would be identically regulated. The "telecommunications service" component would make each one a mandatory contributor under §251(d). Section 254(d) provides that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute" to universal service. These mandatory contributions "on an equitable and nondiscriminatory basis,"are consistent with – and, indeed, compelled by – the Commission's principle of competitive and technological neutrality.

A. The Commission Has Ample Authority to Require Facilities-Based Broadband Internet Access Providers over All Platforms to Contribute to the Universal Service Fund

If the Commission instead classifies broadband Internet access as an "information service" with no telecommunications service component, it can and should require all providers to contribute, consistent with its goal of competitive neutrality. Section 254(d) of the 1996 Act also provides that "[a]ny other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires." In its 1998 Report to Congress, the Commission expressly recognized that, "facilities-based ISPs that provide no stand-alone telecommunications services could be required to contribute to universal service under its permissive authority."[11] Indeed, "to the extent that any of [an ISP's] underlying inputs constitute[s] interstate telecommunications, [the Commission has] the authority under the 1996 Act to require that the providers of those inputs contribute to federal universal service mechanisms."[12] The Report to Congress goes on to state that:

> [i]n those cases where an ISP owns transmission facilities, and engages in data transport over those facilities in order to provide an information service … [o]ne could argue that in such a case the ISP is furnishing raw transmission capacity itself. To the extent this means the ISP is providing telecommunications as a non-common carrier, it would not generally be subject to Title II, but it may be required to contribute to the preservation and advancement of universal service if the public interest so requires.[13]

All broadband Internet access providers who use their own transmission facilities to engage in data transport -- regardless of the platform they employ -- also provide telecommunications to themselves. For example, the Commission acknowledged in its Cable

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[11] *Ibid.,* ¶ 74. *See also, Federal-State Joint Board on Universal Servic*e, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11534-11535, ¶ 69 (Report to Congress). A better reading, which supports the hybrid service approach, is that the ISP is also offering telecommunications to the public, although it has bundled them with its information capabilities. At the time of the Report to Congress, the Commission realized that the growth of the Internet would require it to reexamine its policies.

[12] *See,* Report to Congress, 13 FCC Rcd 11532-11533, ¶ 66.

[13] *Ibid.,* 13 FCC Rcd 11534, 11569-11570, ¶¶ 69 and 139.

Modem Declaratory Ruling that the provision of cable modem service is accomplished "via telecommunications."[14] Consequently, the Commission has ample authority under §254(d) to require facilities-based broadband Internet access providers over all platforms to contribute, regardless of how it classifies the communications and information capability functions or what contribution method it adopts.

B. The Public Interest Requires the Commission to Exercise Its Authority over All Facilities-Based Broadband Internet Access Providers, Regardless of Any Provider's Platform or the Contribution Assessment Method

As the telecommunications marketplace evolves, it is essential that the Commission "make sure that [its] interpretation of the statute, to the extent legally possible, will continue to sustain universal service in the future."[15] In order to accomplish this paramount goal, the Commission must ensure both the stability of the contribution base and the sufficiency of the fund. This is particularly important in light of recent trends in the marketplace for interstate telecommunications.

In the separate but "intertwined" Universal Service Contribution Method proceeding, the Commission states that overall end-user switched interstate telecommunications revenues, which make up the contribution base, are now declining.[16] This is primarily due, no doubt, to the decline in interexchange carriers' (IXCs') interstate revenues. These carriers, of course, currently provide more than half of all universal service funding.[17] Nevertheless, while the contribution base and IXC interstate revenues may be decreasing, overall demand for interstate telecommunications and information services is not. The demand is simply shifting to service

[14] *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* GN Docket No. 00-185, *Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (rel. March 15, 2002), ¶ 39 (Cable Modem Order).
[15] *See,* Report to Congress, 13 FCC Rcd 11548-11549, ¶ 98.
[16] *Federal-State Joint Board on Universal Service, et. al.,* CC Docket No. 96-45, et. al., Further Notice of Proposed Rulemaking, FCC 02-43, ¶ 8 (rel. February 26, 2002) (USF Contribution Methodology FNPRM).

packages and service providers in which either the precise portion of revenues attributable to interstate telecommunications cannot easily be identified (*e.g.,* mobile wireless carriers' bundled toll and local packages) or the service provider is not presently required to contribute to universal service. The gradually growing use of broadband platforms and Internet Protocol (IP) networks also plays a significant role in destabilizing the contribution base. Applications from e-mail and "instant messaging" to Internet-based telephony are increasingly taking the place of telephone calls. When customers use the Internet more, since only wireline telephone providers contribute to universal service funding for the telecommunications link, any such shift away from traditional interstate telecommunications service erodes the base for funding universal service.[18]

Current market data demonstrate significant growth in the provision of broadband Internet access services by facilities-based providers that do not now contribute to universal service. For example, the Commission's Third Report on the deployment of advanced telecommunications capability states that "cable companies report almost 5.2 million high-speed lines in service using cable modem technology at the end of June 2001, compared to 1.4 million at the end of 1999."[19] And the explosive growth has not ended. One study estimates that cable modem subscriptions "will continue to increase dramatically, reaching an estimated 28-30 million by 2006."[20] With such a rapid deployment rate, it comes as no surprise that, in the near

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[17] *Ibid.,* ¶ 7.
[18] *See,* Report to Congress, 13 FCC Rcd 11501, 11548-11549, ¶ 98.
[19] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, CC Docket No. 98-146, FCC 02-33, ¶ 44 (rel. Feb. 6, 2002) (Third Report). The statistics also show that carriers delivering broadband via terrestrial fixed wireless or satellite platforms each comprise approximately 50,000 to 150,000 high-speed lines individually. These broadband providers are also not presently required to contribute to universal service. *Ibid.,* ¶¶ 55 and 60.
[20] Third Report, ¶ 66, (citing Richard Bilotti, Benjamin Swinburne, and Megan Lynch, *Broadband Cable Television, The Past is Prologue to the Future…* , Morgan Stanley Equity Research, Oct. 4, 2001, at 28-30 *(Morgan Stanley Broadband Cable Repor*t).

future, "more than 50% of all broadband customers will get onto the Internet through a cable modem."[21]

Broadening the base of contributors to include all facilities-based broadband Internet access providers helps to ensure a fair and sustainable contribution base as the telecommunications marketplace continues to evolve. A sustainable support base is essential to meeting the requirement for "sufficient" support under §254(e).

Furthermore, when some telecommunications providers are not required to contribute to universal service, the burden on those who are required to contribute is obviously greater. Thus, no matter what contribution assessment method the Commission adopts, all facilities-based broadband Internet access providers should contribute on the same basis.[22]

C. Equitable Universal Service Contributions from All Facilities-Based Broadband Internet Access Providers Are Necessary to Comply with §254(d) and the Commission's Principles of Competitive and Technological Neutrality

A requirement that facilities-based broadband Internet access providers over all platforms contribute equitably to universal service is necessary to comply with §254(d)'s nondiscrimination requirement, as well as the Commission's own principle of competitive and technological neutrality.[23] It is neither equitable nor nondiscriminatory, much less competitively neutral, to require only wireline telecommunications carriers to contribute on the basis of revenues earned from broadband transmission service, while exempting all other broadband providers and platforms from the obligation. The Commission has stated that, "in order to

[21] Mike Goodman, *Residential Broadband – Provisioning Cable Modem Service,"* Yankee Group Reports, October 18, 2001, Executive Summary. *See also,* Jane Black, *"Beware, Baby Bells,"* Business Week, August 21, 2001.
[22] Certainly, it would be illogical to make any changes to the contribution assessment methodology without first or concurrently including all facilities-based broadband Internet access providers as contributors. *See,* NRTA and OPASTCO Comments, CC Docket no. 96-45 (filed April 22, 2002), pp. 12-19.
[23] *Federal-State Joint Board on Universal Servic*e, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8801-8802, ¶¶ 47-48 (1997).

promote equity and efficiency, we should avoid creating regulatory distinctions based purely on technology."[24] As broadband usage grows, so, too, does the inequity of the present system.

Allowing some competing broadband Internet access service providers to avoid universal service obligations also creates opportunities for regulatory arbitrage. Broadband Internet access providers that are exempt from contributing to universal service have a competitive advantage over those who are required to contribute, as they do not need to recover any support payments from their end users.[25] It is anomalous that cable companies providing cable modem service, now the market leaders in the provision of broadband services,[26] are exempt from contributing to universal service, while telecommunications carriers providing the same function via digital subscriber line (DSL) service are subject to USF assessments. Indeed, if a connection-based method is adopted without including all facilities-based Internet access providers, the DSL competitive inequity will grow still greater. Customers should not be driven to one broadband Internet access provider or platform over another based on the Commission's universal service contribution policy. Rather, telecommunications users should select a provider based on its services, quality, and prices. Federally-mandated support obligations simply should not be a factor within a competitive marketplace. Therefore, as interstate telecommunications traffic migrates to the competitive broadband Internet access market, the Commission should recognize that there is a "telecommunications service" component in Internet access service and require "equitable and nondiscriminatory" contributions. Even if it continues to treat the

[24] *See,* Report to Congress, 13 FCC Rcd 11548-11549, ¶ 98.
[25] *See,* GAO Report, p. 22, fn. 31. ("IP telephony calls, which do not include universal service charges [which, for large companies average between 8 to 12 percent of the total telephone bill] can mean a savings of around 10 percent on corporate telephone bills. This savings … may make IP networks attractive to large business end users.") *See also,* Report to Congress, 13 FCC Rcd 11501, 11548-11549, ¶ 98. ("[i]f such providers are exempt from universal service contribution requirements, users and carriers will have an incentive to modify networks to shift traffic to Internet protocol and thereby avoid paying into the universal service fund or, in the near term, the universal service contributions embedded in interstate access charges.")

communications component only as "telecommunications," the Commission must scrupulously apply its neutrality principle by requiring all broadband Internet access providers to contribute to universal service.

VI. CONCLUSION

The Commission's primary objective of encouraging ubiquitous broadband availability requires definitions and policies that allow and encourage investment even in the outlying highest-cost rural areas where market forces will achieve the goal slowly and late, if ever. The Commission should, thus, treat all platforms equally, but must not lightly discard its ability to balance and fulfill the statutory purposes and directives. It should define broadband Internet access as a hybrid service that has both a "telecommunications service" and an "information service" component to preserve crucial Title II tools. These must include providing minimal necessary universal service support when the time comes and the current option for joint tariffing and pooling. Even if it takes the tack of defining broadband Internet access as an "information service" with no Title II component, the Commission must find some way to duplicate and sustain these necessary functions under Title I or by adopting a less rigid and drastic interpretation of the definitions. And, to ensure a stable, competitively neutral, sustainable and "sufficient" universal service support mechanism, the Commission should immediately require

[26] There were a total of 3.8 million high-speed lines using digital subscriber line (DSL) technology in service as of June 2001, as compared to 5.2 million lines using cable modem technology. Third Report, ¶¶ 44, 49, and 52.

all facilities-based broadband Internet access providers to contribute equitably and on the same basis to universal service funding. They must contribute on an identical basis, regardless of the platform they use or the contribution assessment method the Commission adopts.

Respectfully submitted,

NATIONAL RURAL TELECOM ASSOCIATION

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May 3, 2002